BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PHILIP J. SPRINGER	)	
Claimant	)	
VS.	)	
	)	Docket No. 208,346
SUNSHINE BISCUITS, INC.	)	
Respondent	)	
AND	)	
INDUSTRIAL INDEMNITY	)	
Insurance Carrier	)	
AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent and its insurance carrier appeal from an Award entered by Administrative Law Judge Julie A. N. Sample on September 24, 1998. The Appeals Board heard oral arguments in Kansas City, Kansas, on April 20, 1999.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared on behalf of claimant. Gary R. Terrill of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier. Michael R. Wallace of Shawnee Mission, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits to be paid by respondent based on a 44 percent work disability. On appeal, respondent asks for review of the following issues:

1. Should the claim be denied because claimant unreasonably refused medical treatment? Specifically, respondent contends benefits should be denied because claimant failed to lose weight as recommended,

stopped taking prescribed blood pressure medication, and failed to exercise as recommended.

2. Are respondent and its insurance carrier entitled to credit for prior impairment pursuant to K.S.A. 44-501(c)?

3. What is the nature and extent of claimant's disability? Respondent contends claimant should be limited to functional impairment because, according to respondent, claimant could have continued to work for respondent at a comparable wage. According to respondent, the circumstances of this case are similar to the facts in *Lowmaster v. Modine Manufacturing Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* ___ Kan. ___ (1998).

4. Is the Kansas Workers Compensation Fund liable for all or any portion of the benefits awarded?

5. What is the amount of compensation due claimant?

Claimant also asks for review of the findings regarding nature and extent of disability. Claimant contends both the task loss and wage loss prongs of the work disability formula should be increased. As to task loss, claimant argues the Administrative Law Judge erred when she modified the loss to eliminate duplicate tasks. As to wage loss, claimant contends the post-injury wage imputed by the Administrative Law Judge was overly optimistic.

Finally, the Kansas Workers Compensation Fund argues it should be entitled attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the evidence, the Appeals Board concludes the Award should be modified. The Board concludes claimant should be awarded benefits for a 63.5 percent work disability for an accident date of December 29, 1995, with all of the award assessed against the respondent and its insurance carrier. The Fund's request for an award of attorney fees is denied.

Findings of Fact

1. Claimant originally alleged a low back injury caused by a single work-related traumatic event on September 21, 1993, and a gradual work-related aggravation through the last date worked of December 29, 1995. The Administrative Law Judge found a single

injury on September 21, 1993, with temporary aggravation but no permanent injury thereafter.

2. Claimant began working for respondent in August 1983 as a laborer and in 1989 became a line mechanic. As a line mechanic, he did maintenance on industrial machinery. He worked on his feet approximately seven of the eight hours of the work day. He handled funnels weighing 40 to 100 pounds and, with one or two other persons, pushed 700 to 800 pound conveyors which rolled on small wheels. He had a series of low back injuries, strains, and sprains before the injury involved in this case. He had injuries in October 1983, September 1984, September 1985, and May 1989. In each case, claimant was released to return to his regular duties. No restrictions were imposed and no impairment rating made. Claimant limited his recreation activities after the 1989 injury but continued to perform his job as a mechanic. Claimant did not miss work or seek additional medical treatment between the 1989 injury and 1993 when claimant suffered the injury which is the subject of this case.

3. In 1989, claimant completed a medical examination form and on the form indicated he responded "yes" when asked if he had ever had his work limited or restricted because of his health. He there mentioned a pinched nerve and stiff back. He also indicated he had a prior back injury. He described the injury as a pulled muscle in the lower back.

4. On September 21, 1993, claimant injured his low back lifting an approximately 100-pound funnel. Respondent sent claimant to Bethany Medical Center emergency room where he was referred to the Occupational Medicine Clinic and then to Dr. William O. Reed, Jr.

5. Dr. Reed first saw claimant October 11, 1993. Dr. Reed ordered an MRI which showed a small central disc herniation at L5-S1 and a larger central and slightly left-sided herniation at L4-5 with degenerative disc disease from L3-4 through L5-S1. Dr. Reed discussed surgery as a possibility but opted for medication and epidural injections. He also recommended weight loss. Dr. Reed took claimant off work for approximately one month and then released him to light duty. Dr. Reed released claimant to full duty without restrictions January 5, 1994. Dr. Reed last saw claimant April 4, 1994. As of that date, Dr. Reed felt claimant could perform all of the work tasks claimant had performed in the 15 years preceding the current injury. Dr. Reed scheduled a follow-up visit but claimant did not go.

6. Claimant returned to work after Dr. Reed released him in January 1994. And after the last visit with Dr. Reed in April 1994, claimant did not seek additional medical treatment until he saw Dr. Edwin E. MacGee in June 1995. Claimant went to Dr. MacGee after reporting to respondent's insurance carrier that he continued to have pain and numbness in both legs. Respondent would not authorize additional treatment and advised claimant of his right to payment of up to $500 for unauthorized care.

7. Claimant saw Dr. MacGee on two occasions. The first was in June 1995 before claimant left work for respondent, and the second was July 1996 after claimant left work for respondent. Dr. MacGee testified that claimant's condition was essentially the same on each of these two occasions and, in fact, may have improved by the time of the second visit. Dr. MacGee also recommended weight loss. Claimant had gained weight since seeing Dr. Reed the first time. Dr. MacGee also reviewed the record from the treatment before the current accident and opined that claimant had no permanent impairment before this accident.

8. In October 1995, claimant again experienced back pain again while lifting a funnel. Claimant took a few days off and then returned to work until some time in December 1995 when, according to claimant, the pain became intolerable and he took personal leave. Claimant missed a total of 15 to 18 days during 1995 for problems with his low back. The record does not show that he informed respondent why he was missing work. He took vacation and used what he referred to as free days. Claimant testified his back was worse when he left work in 1995 than it had been after the September 1993 accident. Claimant has not returned to work for respondent or any other employer since. At the time claimant took personal leave he told respondent he wanted the time off so he could get his back straightened out. He also mentioned his low back problems on the leave form he filled out.

9. The claimant testified that he missed quite a few days of work because of pain between the 1993 and 1995 accidents, that the bending and stooping killed his back, that his back pain would be tolerable on Monday but by Friday the pain would be intolerable, that his condition gradually worsened up to the October 1995 incident, that his condition was worse after the incident of October 1995, and that he was no longer able to perform his work duties when he left work in December 1995.

10. Claimant has done very little to find work since leaving his employment with respondent. Claimant testified that he had made five job inquiries.

11. After leaving work for respondent, claimant filed a preliminary hearing application and a hearing was held in March 1996. The Administrative Law Judge ordered respondent to pay temporary total disability benefits and to give claimant three names from which to choose for his medical treatment. Claimant chose Dr. Timothy E. Stepp who referred claimant back to Dr. MacGee for the previously mentioned second examination by Dr. MacGee in July 1995. Claimant remained unsatisfied with the medical treatment and filed a second application for preliminary hearing which was heard in October 1996. Between March and October 1996, claimant gained weight, going from 260 pounds in March to 310 pounds at the time he saw Dr. Revis C. Lewis in August 1996. Claimant testified he had been trying to lose weight but had not been able to exercise or do the work he normally did around his house. He had restricted his calories but still had not lost weight. From the second preliminary hearing, the Administrative Law Judge again ordered respondent to provide medical treatment, this time through occupational medicine, and temporary total disability if taken off work by the authorized physician.

12. After the second preliminary hearing, claimant saw Dr. J. Patrick Walker who performed a repeat MRI and then referred claimant to a physiatrist, Dr. Vito J. Carabetta. When claimant saw Dr. Carabetta he weighed 324 pounds, and Dr. Carabetta also recommended weight loss. But because claimant had high blood pressure, Dr. Carabetta did not authorize a specific reconditioning program. Claimant testified he did not, at this time, have the money to see a physician for his blood pressure problems.

13. In early 1997 claimant again sought to obtain additional medical treatment and filed a third application for preliminary hearing. From the hearing held March 31, 1997, the Administrative Law Judge ordered that claimant be evaluated by Dr. Joan P. Moore. The purpose of the evaluation was to determine whether claimant would benefit from a medically-supervised course of treatment to lose weight. Dr. Moore determined she could not give medication to reduce claimant's appetite while his blood pressure was elevated. She gave claimant medication for the blood pressure. Claimant took the medication for several weeks but then discontinued it.

14. Claimant had lost approximately 70 pounds in the six months before the regular hearing of May 1998. Claimant testified the weight loss did not lessen his symptoms.

15. Claimant was examined and evaluated by Dr. Revis C. Lewis at the request of claimant's counsel. Dr. Lewis saw claimant on August 28, 1996, and again on February 3, 1997. Dr. Lewis diagnosed lumbosacral strain at L4-5 and L5-S1. He recommended claimant avoid lifting more than 20 to 30 pounds occasionally, not engage in repetitive bending, and not stand/sit more than 30 to 60 minutes without rest. He opined that claimant would not be able to return to his job involving lifting 50 pounds, awkward positions, and repetitive bending. He also concluded the 1995 injury permanently aggravated claimant's low back.

Dr. Lewis reviewed a list of the tasks claimant had done at work in the 15 years before the accident. He concluded claimant cannot now do nine of those tasks, can do one, and one is borderline.

Dr. Lewis testified he would not have considered claimant to be handicapped before the 1993 accident.

16. Claimant saw Dr. Mary E. Brothers on two occasions. The first, in September 1996, was at the request of the Missouri disability determination section. The second, in October 1997, was at the request of claimant's counsel. She diagnosed herniated discs at two levels. She rated the impairment pursuant to the AMA Guides, Fourth Edition, as 10 to 20 percent. She recommended restrictions that claimant should not lift over 20 to 30 pounds repetitively, claimant should avoid repetitive bending at the waist or stooping/squatting, claimant should not stand or lean with the upper body flexed forward for long periods of time, claimant should not sit more than one hour with frequent breaks to stand/stretch, and claimant should walk as much as possible.

Dr. Brothers reviewed the same list of tasks Dr. Lewis had reviewed. She considered two of the tasks to be duplicative, leaving a total of nine tasks. She testified claimant could perform only one of the nine.

Dr. Brothers testified that continued work at the same job from 1993 to 1995 aggravated the original problem. She saw no evidence claimant was handicapped using the AMA Guides definition of handicapped.

17. Dr. P. Brent Koprivica and Dr. Edward J. Prostic both examined and evaluated claimant's injury apparently primarily for the purpose of determining issues relating to Fund liability. Dr. Prostic found no evidence of permanent impairment before the 1993 injury and no permanent increase in impairment from the October 1995 injury. But Dr. Prostic also testified that claimant's work was probably an activity that would worsen his condition.

Dr. Koprivica testified that but for preexisting degenerative disc disease, claimant would not have sustained the impairment resulting from the 1993 injury. Dr. Koprivica concluded that claimant has a 15 percent permanent partial impairment using the range of motion method and a 10 percent impairment using the DRE categories, both under the AMA Guides, Fourth Edition.

18. Mr. Michael J. Dreiling, a vocational rehabilitation specialist, prepared a list of the tasks claimant had performed at work during the 15 years before the injury. He testified claimant should have been able to reenter the labor market at $6 to $7 per hour with an increase to $7.50 to $8 at the time of Mr. Dreiling's deposition. He also testified that some of the jobs claimant could perform paid fringe benefits and that fringe benefits generally range from 15 to 30 percent of the base pay.

19. Mr. Gary Weimholt also testified to the tasks claimant performed in the 15 years before this injury. He gave his own estimate that the task loss was 53 percent. But no physician testified in support of this conclusion and the opinion does not satisfy the requirement of K.S.A. 44-510e that the task loss opinion be the opinion of a physician. He also testified to his opinion that the claimant should be able to earn from $280 to $350 per week with fringe benefits of 25 to 33 percent of that wage.

Conclusions of Law

1. Claimant's response to medical treatment does not, in this case, warrant termination or reduction of benefits. K.S.A. 44-518 provides that benefits may be terminated if a claimant refuses to submit to medical examination. K.A.R. 51-9-5 provides that if a claimant unreasonably refuses to submit to medical or surgical treatment he/she will not be entitled to benefits beyond the time he/she would have been disabled if he/she had submitted to an operation. Although claimant has not, in several instances, followed up with care as recommended, he has not refused to submit to the examination. He did not initially lose weight as recommended. But failing to lose weight, at least when as the Administrative

Law Judge pointed out no support or assistance was provided, is not, in our view, equivalent to refusing treatment. In addition, while several physicians testified weight loss should alleviate claimant's back symptoms, the record does not suggest he has refused an operation or that his disability would have ceased if he had submitted to medical or surgical treatment. When claimant eventually did lose weight, it did not alleviate his symptoms.

2. Before addressing issues relating directly to the extent of disability, the Board first finds that claimant suffered an accident on September 21, 1993, followed by gradual aggravations from work activities up to the last day worked in December 1995. The Board specifically finds that the injury was made permanently worse by the subsequent work through the last day worked. This conclusion is based on several considerations. First, the claimant was released to return to his regular duties after the 1993 accident. The Board also relies on the claimant's testimony. The claimant testified that he missed quite a few days of work because of pain between the 1993 and 1995 accidents, that the bending and stooping killed his back, that his back would be tolerable on Monday but by Friday would be intolerable, that his condition gradually worsened up to the October 1995 incident, that his condition was worse after the incident of October 1995, and that he was no longer able to perform his work duties when he left work in December 1995. Claimant's testimony is supported by testimony from Dr. Lewis who testified it was fair to assume the October 1995 incident caused permanent aggravation, by the testimony of Dr. Brothers who testified she thought the continued work after September 1993 aggravated claimant's problem, and testimony from Dr. Prostic that the work was probably an activity that would worsen claimant's condition.

The Administrative Law Judge found only a September 1993 accident and in so finding acknowledged that the evidence could support any one of several alternatives. The Board agrees. As the Administrative Law Judge pointed out, the MRIs suggest little, if any, change from 1993 to 1996. This and other evidence would support the decision by the Administrative Law Judge. Nevertheless, the Board finds it more probable, from the record as a whole, that claimant did suffer additional work-related injury through the last day worked, leading ultimately to the conclusion he could no longer perform his job.

There is no dispute that claimant suffered a work-related injury on September 21, 1993. The Board, therefore, finds claimant suffered two accidents, one on September 21, 1993, and the second on December 29, 1995, the last date worked. *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

3. The Board finds claimant has not proven the extent of the disability he had from the 1993 accident. The only functional ratings were made after December 1995 and none attempt to apportion the impairment between the 1993 and 1995 accidents. No permanent work restrictions were recommended until after claimant left work in 1995.

4. Although the restrictions were not recommended until after claimant left work, the Board finds claimant was not, as a result of a work-related injury, able to perform the duties for the job with respondent. And after he left work for respondent, he did not earn 90 percent or more of the wage he earned working for respondent. A work disability should, therefore, be considered. K.S.A. 44-510e.

5. The Board considers the circumstances presented in this case to be materially different from the circumstances presented in *Lowmaster v. Modine Manufacturing Co*. In *Lowmaster*, the claimant left work without advising respondent of the reasons for leaving, thus making it impossible for the respondent to provide accommodated work. In this case, claimant told respondent why he was leaving. In *Lowmaster*, the evidence indicated the respondent would have accommodated the injury if they had known. The record in this case contains no similar evidence. In summary, the Board concludes the principles applied in the *Lowmaster* decision do not apply here to preclude an award of work disability.

6. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

7. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

8. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

9. The Board agrees with and adopts the finding by the Administrative Law Judge that the claimant has not made a good faith effort to find employment since leaving work for respondent.

10. The Board agrees with and adopts the finding by the Administrative Law Judge that claimant has the ability to earn $350 per week plus fringes for a total average weekly wage of $437.50. Claimant's average weekly wage in December 1995 was, as the parties stipulated, $703.94. The wage loss is, therefore, 38 percent.[1]

11. The Board concludes claimant has an 89 percent task loss. This conclusion is based on the opinions of Dr. Lewis and Dr. Brothers. Both agree that claimant can do only one task on the list. Although Dr. Lewis describes one additional task as borderline, claimant has the burden of proving the loss and a description that the task is borderline does not meet that burden. Dr. Brothers considered 2 of the 11 tasks to be duplicative, leaving 9 tasks and stated that claimant could perform 1 of the 9. The Board agrees with Dr. Brothers, and the result leaves only 9 tasks on the list. Both Dr. Lewis and Dr. Brothers identified only one that claimant could do.

The Administrative Law Judge found certain tasks to be duplicative but does not state precisely which to arrive at the 53 percent loss. The Board agrees that duplication should be eliminated but the record supports a conclusion the list should be reduced to 9 tasks.

12. The Board concludes claimant is entitled to benefits based on a 63.5 percent work disability arrived at by averaging the task loss for 89 percent and the wage loss of 38 percent.

13. Respondent is not entitled to credit for preexisting impairment. K.S.A. 44-501(c) requires reduction of any award by the amount of preexisting functional impairment. The record does not, in our view, establish the extent of impairment, if any, claimant had before the 1993 injury. While there is evidence that claimant had preexisting degenerative disc disease, the evidence does not support a conclusion that the disease rose to the level of a permanent functional impairment.

Similarly, as found above, the record does not reflect the extent of disability before the 1995 date of accident.

14. Respondent admitted timely notice for the 1993 accident but denied notice of a 1995 accident. It appears respondent is denying notice of an accident involving gradual aggravation from 1993 to 1995. The claimant testified, and the Board finds, claimant notified respondent two days after the incident in October 1995. Claimant also told respondent when he left in December 1995 he was leaving employment because of his back. On January 4, 1996, claimant filed his Application for Hearing alleging injury in

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[1] This wage loss is higher than that found by the Administrative Law Judge only because the claimant's wage in December 1995, which the Board found to be the date of accident, was higher than the wage in September 1993, the date the Administrative Law Judge used as the date of accident.

September 1993 with subsequent aggravation. This Application was less than 10 days after claimant's last day of work, December 29, 1995.

15. The Board finds that the Fund has no liability in this case. At the time of the 1995 accident the legislature had eliminated Fund liability from our Act. K.S.A. 44-567. The Board also agrees with and adopts the conclusion by the Administrative Law Judge that claimant was not a handicapped employee at the time of the 1993 accident.

16. The Board finds it would not be appropriate to charge respondent with the Fund's attorney fees in this case. There was evidence of prior low back injuries and although the Board has found there is no Fund liability, pursuit of the claim by the respondent was reasonable under the circumstances.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Julie A. N. Sample on September 24, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Philip J. Springer, and against the respondent, Sunshine Biscuits, Inc., and its insurance carrier, Industrial Indemnity, for an accidental injury which occurred December 29, 1995, and based upon an average weekly wage of $703.94, for 4.29 weeks of temporary total disability compensation at the rate of $313 per week or $1,342.77,[2] followed by 263.53 weeks at the rate of $326 per week or $85,910.78, for a 63.5% permanent partial disability, making a total award of $87,253.55.

As of May 27, 1999, there is due and owing claimant 4.29 weeks of temporary total disability compensation at the rate of $313 per week or $1,342.77, followed by 173.57 weeks of permanent partial disability compensation at the rate of $326 per week in the sum of $56,583.82, for a total of $57,926.59, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $29,326.96 is to be paid for 89.96 weeks at the rate of $326 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

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[2] The amount and rate of temporary total disability benefits were not made an issue on appeal.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS
Gary R. Terrill, Overland Park, KS
Michael R. Wallace, Shawnee Mission, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director